

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Part 22 of the Commission's	)	WT Docket No. 03-103
Rules To Benefit the Consumers of Air-Ground	)	
Telecommunications Services	)	
	)	
Biennial Regulatory Review-Amendment of	)	
Parts 1, 22, and 90 of the Commission's Rules	)	
	)	
Amendment of Parts 1 and 22 of the	)	WT Docket No. 05-42
Commission's Rules To Adopt Competitive	)	
Bidding Rules for Commercial and General	)	
Aviation Air-Ground Radiotelephone Service	)	
To: The Commission		

**COMMENTS OF AIRCELL, INC.**

AirCell, Inc. ("AirCell"), submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") released February 22, 2005 in the above-referenced docket, which sought comment on the competitive bidding procedures for commercial and general aviation Air-Ground Radiotelephone Service ("ATG") licenses. <sup>1/</sup> AirCell applauds the Commission for its continued recognition of the Congressionally mandated need to create opportunities for small businesses to

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<sup>1/</sup> *Amendment of Parts 1 and 22 of the Commission's Rules To Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, WT Docket No. 05-42, Notice of Proposed Rulemaking, FCC 04-287 (rel. Feb. 22, 2005) ("*NPRM*"). This notice was published in the Federal Register on Wednesday, April 13, 2005 at 70 FR 19377.

participate in the provision of nationwide spectrum-based services. <sup>2/</sup> Moreover, AirCell fully agrees with the Commission’s assessment that “small business bidding credits are appropriate for the commercial air-ground service.” <sup>3/</sup> The ATG licenses are uniquely suited for small businesses because of the anticipated low development and operational costs relative to other nationwide spectrum licenses. <sup>4/</sup> In order to create a more realistic opportunity for a small business to be awarded the air-ground spectrum, however, AirCell strongly urges the Commission to raise the bidding credit proposed in the NPRM for small businesses from 15 percent to 25 percent, and the bidding credit for very small businesses from 25 percent to 35 percent.

Bidding credits are critical in creating an auction environment in which small businesses, like AirCell, are capable of competing against much larger companies for spectrum. As AirCell stated in its earlier *ex parte* comments, <sup>5/</sup> it is well established by the Commission that bidding credits are specifically authorized by the Communications Act and are useful “to promote economic opportunity and to counterbalance the tendency of auctions to concentrate license ownership in the hands of several large companies.” <sup>6/</sup> In order to be effective, the credits must be

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<sup>2/</sup> See *NPRM* at ¶¶ 172-174.

<sup>3/</sup> *NPRM* at ¶ 174.

<sup>4/</sup> *Id.*

<sup>5/</sup> Letter from Michele C. Farquhar, Counsel to AirCell, to Marlene H. Dortch, FCC Secretary, September 17, 2004, filed in WT Docket 03-103.

<sup>6/</sup> *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532 (1994) at ¶ 15 (bidding credits

tailored for the specific circumstances in each auction. Nowhere is the need for bidding credits greater than in the case of nationwide spectrum licenses, which typically involve the greatest commitment of capital in order to acquire the license. For this reason, the Commission has wisely recognized the need for small business bidding credits in past auctions for nationwide spectrum licenses. <sup>7/</sup>

Despite this effort, as the Commission noted in the NPRM, none of the bidding credits authorized by the Commission in the past has yielded a single small business auction winner for a nationwide services license. <sup>8/</sup> AirCell submits that this failure should not be construed as an indication that small businesses are inherently incapable of providing nationwide services, but as an indication that the credits authorized in these auctions were simply too small. Small businesses have the requisite expertise and are capable of raising sufficient capital to deploy and operate nationwide services. AirCell itself, for example, has already proven its ability to provide nationwide air-ground service, which it is currently doing using cellular spectrum. As a small business, AirCell has successfully: (1) negotiated business deals with 22 cellular licensees across the country; (2) custom engineered

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adopted “to assist designated entities without large investors to overcome the additional hurdle presented by auctions”).

<sup>7/</sup> See *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943 (1997) (“220 MHz Auction Order”); *Amendments to Parts 1, 2, 27 and 90 of the Commission’s Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz and 2385-2390 MHz Government Transfer Bands*, Report and Order, 17 FCC Rcd 9980 (2002).

<sup>8/</sup> NPRM at ¶ 173.

the air and ground components of the network; (3) purchased and installed hardware for over a hundred cell sites; and (4) designed and manufactured FAA-certified hardware for the aircraft. Thus, the greatest challenge facing a small business in this auction will not be to raise the capital needed to develop and implement ATG services; rather, the greatest challenge will be competing with larger companies in the bidding stage, where the tremendous amount of readily-available capital puts larger companies at a strong advantage.

It is important to note that the Commission never intended a “blanket application” of the default bidding credits in Part 1 to all license auctions. <sup>9/</sup> Instead, the Commission regularly solicits comments and adopts bidding credits “specifically tailored” to each service. <sup>10/</sup> This case-by-case analysis has led the Commission to increase the default credits for designated entities in some instances, and to decrease the credits in other instances.

In the LMDS service auction, the Commission adopted a 35 percent credit for businesses with an average gross revenue less than \$40 million, and a 25 percent credit for businesses with average revenues of less than \$75 million. <sup>11/</sup> Similarly, in the regional narrowband PCS auction, the Commission increased the bidding

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<sup>9/</sup> See Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Division, FCC, to Ms. Elizabeth Sachs, Counsel to American Mobile Telecommunications Association, 18 FCC Rcd 25149 (2003).

<sup>10/</sup> See *id.* at 25152.

<sup>11/</sup> *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, Second Order on Reconsideration, 12 FCC Rcd 15082 (1997) at ¶ 20.

credit for women-and minority-owned businesses from 25 percent to 40 percent. [12/](#)

Significantly, in increasing the bidding credit to 40 percent, the Commission reasoned that:

Our experience with the nationwide narrowband PCS auctions, where high license values coupled with only a 25 percent bidding credit may have contributed to the failure of women-and minority-owned businesses to win licenses, suggests that a credit of this magnitude may be necessary to overcome the disadvantages of these groups in bidding for licenses representing large populations and large geographic areas.” [13/](#)

We encourage the Commission to employ this same reasoning for the ATG service license auction. The nationwide nature of the ATG spectrum will make it more difficult for a small business to prevail at auction.

Indeed, the ATG licenses will be even more difficult for a small business to acquire than other nationwide service licenses. Under the novel auction format adopted for the ATG band, the auction itself will determine whether the ultimate band plan will include two competing broadband licenses (band plan 1), or only one exclusive broadband license (band plans 2 & 3). [14/](#) As explained by economist Dr. Paul London in a prior *ex parte* filing, the exclusive license option will be more profitable for a license holder than one of the two licenses available under band

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[12/](#) *Implementation of Section 309(j) of the Communications Act—Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175 (1994) at ¶ 58.

[13/](#) *Id.*

[14/](#) The second license available under band plans 2 & 3 will consist of only 1 MHz and therefore will not be adequate to provide competitive broadband services.

plan 1. [15/](#) The single licensee will be able to maximize corporate profits while reducing consumer choice. [16/](#) This opportunity makes the exclusive license the more attractive proposition for those able to afford it, and provides an additional incentive for a larger company to bring its significant financial leverage to bear in beating out any small business bidders.

The competitive disadvantage of small businesses is exacerbated by the fact that large bidders with terrestrial wireless affiliates will have yet another incentive to place substantial bids in the auction, as they will be able to use an ATG service to cross-promote their terrestrial offerings. Verizon already engages in this practice with its current ATG service, providing sharply discounted ATG calls to existing Verizon Wireless customers. [17/](#)

AirCell appreciates the Commission's continued attention to the need to facilitate small business participation in its spectrum auctions. In this auction, however, the Commission should take additional steps to neutralize the effects of the exclusive license option and the advantageous competitive position enjoyed by bidders with terrestrial wireless affiliates. Even without these issues, past

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[15/](#) See Declaration of Dr. Paul A. London at ¶¶ 12-14 (attachment to Letter from Michele Farquhar, Counsel to AirCell, to Marlene H. Dortch, FCC Secretary, filed in WT Docket No. 03-103, December 8, 2004) ("*London Declaration*") (noting that a single provider market structure is ideal for maximizing 'producer surplus' (*i.e.*, economic rent or payments to the producer(s) above opportunity costs). The 'producer surplus' that bidders expect to achieve using spectrum (a key production input) will be the main factor determining their willingness to pay . . . .").

[16/](#) One need look no further than the high prices of current ATG services offered by Verizon Airfone as evidence of this concern.

[17/](#) See *London Declaration* at ¶ 20 (citing standard rates of \$3.99/minute, versus \$0.10/minute for Verizon Wireless customers).

experience serves as evidence that the default bidding credits are insufficient to ensure that small businesses are able to compete effectively in auctions for nationwide service licenses. Increasing the credits for both small businesses and very small businesses by 10 percent is a moderate and appropriate refinement of the bidding credits for this auction, and is consistent with past practice. Our recommendation will increase the ability of small businesses to compete in this auction without fundamentally altering the auction format established by the Commission's ATG order. [18/](#)

Respectfully submitted,

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Dated: May 3, 2005

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[18/](#) At a minimum, the FCC should adopt the current bidding credit proposal of 15 and 25 percent, although this may not be as effective as the higher credits advocated herein.